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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1028 95

UNION PACIFIC RAILROAD COMPANY, A CORPORATION,

Petitioner,

v.

LILA B. THATCHER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON AND BRIEF IN SUPPORT THEREOF.

ROY F. SHIELDS,
ROBERT F. MAGUIRE,
Counsel for Petitioner.

THOMAS W. BOCKES,
Of Counsel for Petitioner.

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UNION PACIFIC RAILROAD COMPANY, A CORPORATION,

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LILA B. THATCHER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON.

May It Please the Court:

The petitioner, Union Pacific Railroad Company, a corporation, respectfully petitions this Honorable Court to review the final decree of the Supreme Court of Oregon in a suit brought by petitioner to restrain respondent from prosecuting in the courts of California an action at law against petitioner to recover damages under the Federal Employers Liability Act [1] on a cause of action arising in Oregon.

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[1] United States Code, Title 45, Sections 51 et seq.; 45 U. S. C. A. Secs. 51 et seq.

In support thereof petitioner respectfully shows:

A.

Jurisdiction.

(a) The statutory provision sustaining the jurisdiction of this Court in this cause is Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (United States Code, Title 28, Section 344 (b)).

(b) The date of entry of the decree of the Supreme Court of Oregon here sought to be reviewed was March 14, 1944 (R. 54). Said decree was and is the final decree of that Court, which was and is the highest court of law or equity in the State of Oregon in which a decision of said matter could be had. This petition for writ of certiorari, supporting brief and the record in said cause are being filed in this Court within three months after the entry of said final decree.

(c) This case arises under the Federal Employers Liability Act (35 Stat. 65; 36 Stat. 291; 36 Stat. 1167; 53 Stat. 1404; United States Code, Title 45, Sections 51-59) and under Section 6 (8) of the Interstate Commerce Act (39 Stat. 604; United States Code, Title 49, Section 6 (8)) and presents questions of law directly involving the construction of those statutes. The rulings of the Court below were such that this petitioner was and is deprived of rights, privileges and immunities claimed by it under said statutes and under the Fourteenth Amendment to the Constitution of the United States.

(d) The jurisdiction of this Court to review said decree is sustained by said Section 237 (b) of the Judicial Code, by subdivision (a) of Section 5 of Rule 38 of this Court,

and by the decisions of this Court in *N. W. Pacific RR. Co. v. Bobo, Admx.*, 290 U. S. 499; *Swinson v. Chicago, St. P. M. & O. RR. Co.*, 294 U. S. 529; *Chicago Great Western RR. Co. v. Rambo, Admx.*, 298 U. S. 99; *Great Northern Railway v. Leonidas*, 305 U. S. 1; *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44; *Miles, et al., v. Illinois Central R. Co.*, 315 U. S. 698; *Blodgett v. Silberman*, 277 U. S. 1, and *Virginia v. Imperial Coal Co.*, 293 U. S. 15.

B.

Summary Statement of the Matter Involved.

I. *Legal Questions Presented.*

This case presents the following legal questions:

1. May the claimant's privilege of choosing venue under Section 6 of the Federal Act [2] be so exercised during the present war emergency as to compel the carrier either (a) to violate its statutory obligation to expedite the movement of military traffic,[3] or (b) waive its right to be heard on the merits of the damage claim.

2. May such a claimant be enjoined from arbitrarily selecting a forum in which the carrier cannot defend itself

[2] Section 6 of the Federal Employers Liability Act provides:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." This section also confers concurrent jurisdiction on the state courts. 45 United States Code, Sec. 56.

[3] The Interstate Commerce Act provides:

"In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic." United States Code, Title 49, Section 6 (8); 49 U. S. C. A. Sec. 6 (8).

without interrupting the physical operation of its trains in the transportation of essential war traffic.

3. Would such an injunction constitute an encroachment upon the prerogatives of the President or Secretary of War under Section 1361, Title 10, United States Code.[4]

II. *Summary of Facts Involved.*

Alfred M. Thatcher, husband of respondent, while employed as a brakeman on one of petitioner's freight trains, was killed in an accident which occurred near Portland in Multnomah County, Oregon, on February 7, 1942 (R. 2). All witnesses to the accident, which involved two trains, resided in or near Portland (R. 8 *et seq.*). Respondent and her husband also resided in Portland (R. 3).

At all times there were open and functioning within the State of Oregon regularly constituted courts, both State and Federal, of original and general jurisdiction which were conveniently available to respondent for the prompt and effective enforcement of any meritorious claim against petitioner arising out of said accident (R. 14-15). April 27, 1942, respondent caused to be instituted in the Superior Court of Los Angeles County, California, a civil action against petitioner to recover $50,000 damages alleged to have been sustained by respondent because of the death of said Alfred M. Thatcher (R. 6, 24). Petitioner operates a line of railroad extending into Los Angeles, which is over 1100 miles by rail from Portland (R. 16).

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[4] This section provides:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable" (10 U. S. C. Sec. 1361).

September 26, 1942, petitioner brought suit in the Circuit Court of the State of Oregon for Multnomah County to enjoin respondent and her representatives from prosecuting the damage action in California and for incidental relief (R. 1). Petitioner's complaint in the Oregon suit showed that it could not properly defend itself in the California damage action without withdrawing from railroad service for a week or more a large number of its employes who could not be replaced by others because of labor shortages (R. 8, 10, 14); that by direction of the Government, petitioner was engaged in transporting large numbers of troops and vast quantities of vital war material, the prompt movement of which was essential to the prosecution of the war (R. 11-12); that to handle such emergency war traffic petitioner was compelled to work all of its train service employes full time, most of them overtime, and some of them on double shifts (R. 12-13); that the withdrawal of one or more train crews from active service for use as witnesses in the California case would interrupt the physical operation of some of petitioner's trains and retard the movement of emergency war traffic (R. 13); and that in these circumstances the prosecution of respondent's damage case in California would require petitioner either to violate its paramount obligation to the Government during the present war crisis, or to waive its constitutional right to present its defense to the damage claim (R. 16).

Respondent filed a general demurrer to petitioner's complaint upon the grounds that the relief sought by petitioner would be inconsistent with Section 6 of the Federal Employers Liability Act as construed by this Court, and with Section 2, Article IV, and Article VI of the Constitution of the United States (R. 28-29). Respondents demurrer was overruled by the Circuit Court (R. 30). Respondent elected to stand on her demurrer and refused to further

plead (R. 31). On December 3, 1942, the Circuit Court entered a decree[5] substantially as prayed for by petitioner (R. 31).

Respondent appealed to the Supreme Court of Oregon[6] (R. 32). The only error assigned by respondent on such appeal was that the decree of the Circuit Court was in conflict with the venue provisions of the Federal Employers Liability Act as construed by this Court and with Section 2, Article IV, and Article VI of the Constitution of the United States (R. 33-34). Petitioner contended that respondent's privilege of choosing a forum under the Federal Act is not absolute under all conditions, but like other civil privileges is subject to the paramount interests of the public in time of war; that respondent's normal right to choose a distant forum is subordinate to the carrier's right and duty to expedite the movement of military traffic in obedience to Governmental command (49 U. S. C. Sec. 6 (8)); and that the privilege of choosing a forum may not be so arbitrarily exercised as to deprive the carrier of its opportunity to defend without violating its wartime obligations (R. 43, 46).

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[5] Notwithstanding this decree, respondent proceeded with the prosecution of her damage case in California. Petitioner pleaded the Oregon decree in bar and in abatement in the California case but did not attempt to use its Oregon employes as witnesses in the California case. The Superior Court of California declined to give faith and credit to the Oregon decree and the damage case went to judgment. Petitioner appealed to the District Court of Appeals, which affirmed the judgment. *Leet* v. *Union Pacific R. Co.*, 144 Pac. (2d) 64. The Supreme Court of California granted petitioner's application to review and the damage case is now pending before that Court. The facts stated in this footnote were not shown in the record before the Supreme Court of Oregon but they are stated here for the information of this Court if they should be deemed relevant.

[6] Such appeal did not stay the injunction issued by the Circuit Court. *Toy* v. *Gong*, 87 Ore. 454, 460 (170 Pac. 936, 938); *Jaloff* v. *United Auto Indemnity Co.*, 121 Ore. 187, 193, 194 (253 Pac. 883, 885).

February 8, 1944, the Supreme Court of Oregon rendered an opinion directing that the decree of the Circuit Court be reversed upon the ground that such decree was in conflict with Section 6 of the Federal Employers Liability Act as construed by this Court in *Baltimore & Ohio Railroad Co.* v. *Kepner*, 314 U. S. 44, and in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698 (R. 42, 46) and constituted an encroachment upon the prerogatives of the President under Section 1361, Title 10, United States Code (R. 46). The opinion is not yet officially reported in the Oregon Reports but is reported in Volume 146, Pacific Reporter (Second Series) at p. 76.

February 28, 1944, petitioner applied to the Supreme Court of Oregon for a rehearing (R. 50). March 14, 1944, the court denied said application and ordered that the cause be remanded to the Circuit Court with directions to dismiss the suit, but stayed the issuance of its mandate until March 30, 1944 (R. 54). This opinion is not yet officially reported in the Oregon Reports but is reported in Volume 146 Pacific Reporter (Second Series) at page 769. March 28, 1944, the Supreme Court of Oregon entered an order further staying the issuance of its mandate until the final determination of the cause in this Court[7] (R. 55).

C.

Reasons Relied on for Allowance of Writ.

Petitioner submits that this Court should review said decision of the Supreme Court of Oregon for the following reasons:

[7] Under Oregon law the decree of the Circuit Court remains in effect until that court receives the mandate of the Supreme Court and enters a decree as directed in the mandate. Oregon Compiled Laws Annotated, Sec. 10-813; *The Holladay Case*, 29 Fed. 226, 229.

1. The Oregon Court decided Federal questions of substance not theretofore determined by this Court as follows:

(a) It decided, purportedly on the authority of the *Miles* and *Kepner* cases, that a claimant's venue privileges under Section 6 of the Federal Employers Liability Act could be exercised without regard to the carrier's wartime obligations or its opportunity to defend itself in the forum selected (R. 43, 46). That question has not been determined by this Court.[8]

(b) The Oregon Court undertook to determine petitioner's obligations under Section 6 (8) of the Interstate Commerce Act (R. 43), which has not been construed by this Court.

(c) The Oregon Court undertook to determine the power of the President and of the Secretary of War under Section 1361, Title 10, United States Code, with respect to restricting the venue of suits against carriers engaged in transporting troops, munitions and military supplies (R. 44-46). That question has not been decided by this Court.

2. The Oregon Court decided Federal questions in a way probably not in accord with applicable decisions of this Court. So far as the private interests of the parties were concerned, the issue decided was not whether respondent had the right to subject petitioner to "the normal expense and inconvenience of trial in permitted places" (315 U. S. 705), but whether she could exercise that right in such a way as to deprive petitioner of a reasonable opportunity to defend against her claim. From the public point of

[8] The *Kepner* case (314 U. S. 44) was decided November 10, 1941, before the United States was at war. The *Miles* case (315 U. S. 698) was decided by this Court March 30, 1942, shortly after this country entered the war, but the decision was based upon a record made up during normal peacetime conditions. In neither case did this Court have occasion to consider the decisive questions in the present case.

view, the issue decided was not whether respondent has the right to burden interstate commerce indirectly and incidentally by invoking "the requirements of orderly, effective administration of justice" (*Hoffman* v. *Foraker*, 274 U. S. 21, 23), but whether she has the right to interfere with the physical operation of interstate trains carrying military traffic in time of war. Those issues were decided by the Oregon Court in a way probably not in accord with the decisions of this Court in such cases as *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312; *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492; *Denver & Rio Grande R. Co.* v. *Terte*, 284 U. S. 284; *Baltimore & Ohio R. Co.* v. *Kepner*, *supra*, and *Miles* v. *Illinois Central R. Co.*, *supra*.

3. The questions so decided involved matters of serious public concern. The prosecution of respondent's damage action in a forum far distant from the place where the accident occurred was in conformity with a practice which has become widespread during the present emergency[9] (R. 5; 26-27). The effect of such a practice upon the prosecution of the first World War was reflected in General Order No. 18 issued by the Director General of Railroads April 9, 1918 (R. 35), and sustained in *Alabama & Vicksburg R. Co.* v. *Journey*, 257 U. S. 111. This Court has taken judicial notice of the serious effects of such practices upon interstate transportation even during normal times (*Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312).

Prayer.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court

[9] The record shows that during the period from August 1, 1940, to September 1, 1942, respondent's California representatives filed some fifty damage suits in California courts against carriers on causes of action arising in other states (R. 4; 20).

directed to the Supreme Court of Oregon commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and proceedings in the case entitled on its docket "Union Pacific Railroad Company, a corporation, Respondent, v. Lila B. Thatcher, Appellant," and that the Court review and decide the Federal questions presented and reverse the decree of the Supreme Court of Oregon entered in said cause, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

UNION PACIFIC RAILROAD COMPANY,
By ROY F. SHIELDS,
By ROBERT F. MAGUIRE,
Counsel for Petitioner;
THOMAS W. BOCKES,
Of Counsel for Petitioner.

Addresses of Counsel for Petitioner:

ROY F. SHIELDS,
ROBERT F. MAGUIRE,
727 Pittock Block,
Portland 5, Oregon.
THOMAS W. BOCKES,
1416 Dodge Street,
Omaha 2, Neb.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1028

UNION PACIFIC RAILROAD COMPANY, A CORPORATION,

Petitioner,

vs.

LILA B. THATCHER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Report of Opinions Below.

The opinions of the Supreme Court of Oregon are not yet officially reported in final form, but the original opinion (R. 35-49) appears in Volume 146, Pacific Reporter (Second Series), at page 76, and the final opinion (R. 54-55) is reported in Volume 146, Pacific Reporter (Second Series), at page 769.

Jurisdictional Statement.

A concise statement of the grounds on which the jurisdiction of this Court is invoked is set out in the foregoing petition (pages 2 and 3).

Statement of the Case.

The pertinent facts are stated in the foregoing petition (pages 4-7).

Specification of Errors.

The Supreme Court of Oregon erred:

1. In concluding that the decisions of this Court in *Baltimore & Ohio Railroad Co.* v. *Kepner*, 314 U. S. 44, and in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, control the present case (R. 42, 46).

2. In concluding that the command of Congress that in time of war "carriers shall adopt every means in their control to facilitate and expedite the military traffic" [10] is not self-executing but is conditioned upon some demand or order of the President (R. 43).

3. In concluding that the power granted to the President by Section 6 (8) of the Interstate Commerce Act is not self-executing and can be exercised only by formal executive order (R. 43).

4. In holding that Section 1361, Title 10, United States Code,[11] authorizes the President through the Secretary of War to restrict the venue of suits against carriers engaged in transporting troops, munitions or military supplies (R. 45).

Argument.

No liability arises under the Federal Employers Liability Act in the absence of negligence on the part of the carrier, its officers, agents or employes (45 U. S. Code, Sec. 51). As petitioner denied respondent's charges of negligence in

[10] United States Code, Title 49, Section 6 (8), quoted in footnote 3, page 3, of the foregoing petition.

[11] This section is quoted in footnote 4, page 4, of the foregoing petition.

the California case (R. 7-8), it was entitled to be heard upon that issue. Its opportunity to defend must be real and not merely colorable or illusory (*O. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 524-525).

It is admitted that petitioner could not properly present its defense on the factual issues in the California case without the personal presence of a considerable number of its employe witnesses identified in the record (R. 8-10), and that petitioner could not use such employes as witnesses in the California case without taking them out of active service for a week or more and thereby seriously retarding the movement of emergency war traffic (R. 13-14). Petitioner has not felt at liberty to withdraw such employes from public duty in Oregon to serve its private interests in California. Among such employes are two train crews, irreplaceable under present conditions (R. 12-13). Their absence from duty under such circumstances would necessarily suspend or retard the movement of some trains laden with essential war traffic. No one can foretell with exactness the ultimate effect of such an interruption in the movement of troops or supplies to the battlefront; but it seems safe to assume that the delay would at least disrupt time schedules carefully worked out and co-ordinated by those who plan the movement of military traffic to Pacific Coast ports of embarkation.[12]

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[12] "No matter how difficult the task, the Army Service Forces must come through. There are nights when tens of thousands of soldiers must be shifted great distances across the United States. On these same nights heavy freight trains, laden with raw materials, must speed toward industrial plants, while others, loaded with finished tanks, guns and planes, must rush to ports of embarkation." Report on "Military Transport and Supply" issued by the Office of War Information June 30, 1943, and printed in part in the appendix to this brief. The same report quotes the Quartermaster General, who directs the transportation of troops and supplies (10 U. S. Code, Sec. 72), as follows:

> "Never for one moment can we allow our efforts to slow down and let the flow of supplies slacken."

Section 6 (8) of the Interstate Commerce Act [13] provides that "carriers shall adopt every means within their control to facilitate and expedite the military traffic." The Interstate Commerce Commission, the office of Defense Transportation and the carriers have interpreted this provision as self-executing,[14] though not so regarded by the Oregon Court (R. 43-44). The general duty to expedite military traffic seems to be conditioned only on the existence of war or threatened war. Nor is there any indication that specific demand, even if necessary to impose the duty, need be embodied in any formal executive order or directive.[15] Therefore, Section 6 (8) "is not interpreted as merely authorizing issuance of specific preference orders to the carriers, but as including power also to compel them to adopt operating practices necessary in the view of the Office of Defense Transportation to assure preference and precedence to military traffic." And it has been assumed that this preference and precedence necessarily imply that the normal duties of carriers to others are correspondingly modified and subordinated.[16]

Obviously, carriers cannot move trains without employes to man them. The critical shortage of wartime man power is a matter of common knowledge and grave national con-

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[13] Statutory penalties for violation of the carrier's duties under this act are prescribed in Section 10. 49 U. S. Code, Sec. 10.

[14] Fifty-sixth Annual Report of the Interstate Commerce Commission, 1942, pages 4-5.

[15] It seems quite obvious that no general order would accomplish the intended purpose of Congress. Some war shipments must be transported on different time schedules than others if all are to move according to military plans. A blanket order to expedite all military traffic indiscriminately would result in needless congestion and confusion at terminals, docks and Government storehouses.

[16] For example, the carriers have been directed to disregard state laws limiting the length of trains or the number of cars that may be handled in one train. 7 Federal Register (September 15, 1942) 7258; Fifty-sixth Annual Report of the Interstate Commerce Commission, 1943, page 20.

cern. Its immediate effect upon petitioner's operations as early as August, 1942, is shown in the present record (R. 11-12). "The maximum utilization of man power resources" has been authoritatively declared to be a basic national policy.[17] That policy has been effectuated by directives and regulations which have the force of law. The employer's right to hire, and the worker's right to seek employment, are curtailed and controlled. The time and energy of civilian workers, as well as those in the armed forces, are regarded as essential national resources subject to governmental control in the national interest. It follows, of course, that the Government as well as the employer is concerned when an essential war worker is taken off the job.

But independently of specific legal duties, whatever they may be, the railroads of the country, as important parts of the modern military machine, have undertaken to assume their share of the extraordinary burdens of total war. They have not sought to determine with fine precision the exact limits of Federal war power nor the scope of the President's authority as commander-in-chief. (See *Hirabayashi* v. *United States*, U. S. 63 Sup. Ct. Rep. 1375, 1382.) Railroads, like others, have undertaken to perform what they have been directed to do in the common defense, and they have not stopped to obtain adjudications to define the exact point at which compulsory obedience may or may not be enforced.[18] Even if not legally bound to serve in that way, they should have the privilege of doing so. It is conceivably possible, of course, that petitioner might stop its entire railroad operations in Oregon long enough to try the California damage case and still escape prosecution for violating its public duty. But it should not be required to

[17] 8 Federal Register (June 1, 1943) page 7227.

run such a risk even if that were the only consideration involved (*Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 662-663).

We think the necessities of war have subjected respondent also to certain restraints not otherwise imposed. During the present emergency many of the normal rights of every citizen have been curtailed for the common benefit of all. Privileges enjoyed as a matter of course in time of peace have been subordinated to military necessity when the two have come in conflict. That result has not been accomplished by specific amendment of every statute which may recognize normal rights or privileges of citizens, for such a slow and cumbersome process would paralyze the war effort. Instead it has been assumed that the proper exercise of Federal war power is sufficient in itself to subordinate by implication all inconsistent rights or privileges of the individual.[18]

We see no reason for making an exception in respect to the usual privilege of a claimant to select the venue of a suit under the Federal Employers Liability Act. This privilege, which is no part of the fundamental rights of any litigant, consists merely of the right to choose one court rather than another when all are bound by the same law and equally competent to grant full relief. There is nothing particularly sacred about such a privilege. Like others enjoyed in time of peace, it may be subordinated to the common good in time of war. It is hardly conceivable that Congress intended that respondent, while forbidden to use a single pound of food beyond her rationed share, cannot be restrained from obstructing the physical movement of troops and supplies to the battle front. The alternative is

[18] Fifty-sixth Annual Report of the Interstate Commerce Commission, 1942, page 5.

to deny to petitioner not merely a permissive privilege, but a substantial right guaranteed by the Constitution.

The Supreme Court of Oregon seemingly recognized the conflict between respondent's normal privilege to sue in a distant forum and petitioner's duty to the public in time of war (R. 43). It indicated, however, that immediate relief can come only through the war powers of the President under Section 1361, United States Code, which provides:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war materials and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

The Oregon court concluded that the President through the Secretary of War may restrict the venue of suits against such carriers while engaged in transporting war traffic (R. 45) and that any action of the civil courts toward granting such protection would "encroach upon the prerogative of the Commander in Chief of the military forces" (R. 46).

We think the Secretary of War as well as the carriers would be happy if this conclusion were correct. The present record shows ample provocation for such an order if the Secretary has the power to make it (R. 4, 20). But his failure to act, as did the Director General of Railroads in meeting a similar situation during 1918 (R. 26), suggests that he may not share the views of the Oregon Court as to the scope of his power. Except for the short period from December 27, 1943, to January 18, 1944, the carriers have not been under Federal control at any time during the present war.[19] In the absence of such control,

the relief suggested by the Oregon Court seems to be unavailable.

But the extraordinary wartime obligations imposed on carriers by statute are not conditioned upon the ability of the Secretary of War to regulate venue in civil suits against them. His commands are directed to the carriers, not to those who would sue the carriers. Control of suitors is vested in the courts. The proper exercise of such control requires no encroachment on executive prerogatives. Courts as well as other departments of government have some responsibilities arising from the necessities of total war. We see no reason why they should not lend their aid, within their proper jurisdictions, in the common fight for survival.

We find nothing in the *Kepner* and *Miles* cases which forecloses the courts from granting such relief in the circumstances here shown. The *Kepner* case held that the carrier was not entitled to injunctive relief where the inequity alleged was based only on cost, inconvenience or harassment (314 U. S. 53-54). The *Miles* case held that such relief would not be granted merely because of "the normal expense and inconvenience of trial in permitted places" (315 U. S. 705). In each case this Court considered only the carrier's charges of inconvenience, expense and annoyance *to itself*. The public interest was not involved except indirectly and remotely. This Court did not suggest in either case that a claimant is at liberty to use the venue privileges of the Federal act in such a way as to directly obstruct or retard the physical operation of interstate trains even in time of peace.

The substance of the majority opinions in both cases, as we read them, is that Congress expected that the wide

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[19] Fifty-sixth Annual Report of the Interstate Commerce Commission, 1942, pages 2, 3.

choice of venue given to claimants under the Federal act would necessarily subject carriers to "the normal inconvenience and expense of trial in permitted places" and that the courts should not relieve carriers from burdens which Congress had intentionally imposed upon them. But this Court did not suggest that Congress intended that these venue privileges should be used to defeat the Congressional purpose in other and more important matters or to deny to carriers the substance of their constitutional right to be heard. We think it important that such questions be settled by this Court before the present situation grows worse.

Respectfully submitted,

ROY F. SHIELDS,
ROBERT F. MAGUIRE,
Counsel for Petitioner;
THOMAS W. BOCKES,
Of Counsel for Petitioner.

APPENDIX.

Excerpts from a Report of the Office of War Information on Military Transport and Supply issued June 30, 1943

"* * * War materials are moving faster, on longer and more heavily loaded trains, with less time spent on sidings, than in the last war.

"During our first year of the last war, the American railways handled 2,734,527 troops, including inductees. In the present war, in the year prior to December 7, 1942, the railways handled 11,641,838 troops, or more than four times as many. During last November alone, the Army delivered more than 500,000 troops to the railways for trips ranging up to 3,000 miles.

"Six out of every ten servicemen moved by rail in the first year of the present war traveled on special trains. For every five passenger cars there were two baggage or freight cars for the troops' supplies, including large numbers of gondolas and flatcars for trucks, tanks and heavy artillery. But when troops have been moved to camp, long freight trains must rumble day and night. Approximately 4,000,000,000 pounds of varied military equipment must go every month to the more than 1,200 Army camps, posts and stations in this country where battle training is in progress.

"Although railroads today are operating with less equipment over fewer miles of track than in the last war, they are carrying more passengers and freight longer distances. In 1942 the ton-miles of revenue freight had increased 58 per cent over 1917, and the passenger miles 25 per cent. This was accomplished by running longer trains, by moving them faster, by loading cars more heavily and by reducing the time which cars are permitted to spend on sidings under load or empty. During the first twelve months of the present war, the railroads handled approximately 41,000,000 tons of Army freight—about 3⅔ times the amount handled in the peak months of 1918-19.

"Today, freight cars do not pile up at ports, as they did in 1917. At one time during the last war, more than 200,000 freight cars carrying exports were immobilized at or in

back of the Atlantic seaboard. Today the number of railway cars waiting to deliver freight at Atlantic ports rarely exceeds 15,000.

"This healthy traffic condition has been effected by vigilance on the part of the railways and the various government agencies concerned, and by prompt action whenever the slightest threat of congestion has appeared. Because delay in the movement of Army freight is inadmissible, Major General Charles P. Gross, Chief of the Army Transportation Corps, Army Service Forces, has insisted that traffic in the ports be kept moving, and has taken a leading part in establishing the cooperative machinery which is achieving that result."

"The fact that no need has yet developed for tight control over domestic traffic is a source of pride to the Transportation Corps. Despite the fact that the railroads of the country have 500,000 fewer cars and 20,000 fewer locomotives than they had in 1917 they are nevertheless handling an all-time high in terms of ton-miles hauled. According to General Gross, the railroads themselves can claim much of the credit for their excellent showing." * * *

"Application of time-table technique begins back on the assembly lines in the production areas. A movement of gigantic proportions was the one begun last fall which terminated on the coasts of Africa. * * *

"This landing has been called one of the most magnificent operations of its kind in military history. It began in cities such as Chicago, Detroit, St. Louis, Kansas City, Glasgow and Liverpool." * * *

"No matter how difficult the task, the Army Service Forces must come through. There are nights when tens of thousands of soldiers must be shifted great distances across the United States. On these same nights heavy freight trains, laden with raw materials, must speed toward industrial plants, while others, loaded with finished tanks, guns and planes, must rush to ports of embarkation. All the while the machinery of training of new troops has to continue without slowdown or interruption just as the fighting continues on the front lines. And supplies must reach the battle fronts regularly and generously.

"In this regard an apt ASF slogan is posted in the Office of General Somervell:

'The impossible we do immediately
The miraculous takes a little longer.'

And here is the rule laid down by Major General E. B. Gregory, the Quartermaster General: 'Never for one moment can we allow our efforts to slow down and let the flow of supplies slacken.' "

(1891)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 1028

UNION PACIFIC RAILROAD COMPANY
(a corporation),
Petitioner,

vs.

LILA B. THATCHER,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon.

BRIEF OF RESPONDENT IN OPPOSITION.

GEORGE M. NAUS,
Alexander Building, San Francisco 4, California,
Attorney for Respondent.

CLIFTON HILDEBRAND,
Bank of America Building, Oakland 12, California,

LOUIS H. BROWNSTONE,
Russ Building, San Francisco 4, California,
Of Counsel.

Subject Index

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OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Oregon is reported in 146 Pac. (2d) 76 (not yet officially reported). It also appears in the record at page 35. The opinion of the Supreme Court of the State of Oregon on denial of a rehearing is reported in 146 Pac. (2d) 769 (not yet officially reported). It also appears in the record at page 54.

JURISDICTION.

The opinion of the Supreme Court of the State of Oregon was rendered February 8, 1944. A petition for rehearing was denied by the Supreme Court of Oregon on March 14, 1944. Petition for writ of certiorari was filed on May 23, 1944 and served on respondent on June 2, 1944. Jurisdiction, if present, must come from Section 237b of the Judicial Code, as amended by the Act of February 13, 1925, but is not present because of the absence of any substantial Federal question.

The case does not arise under the Federal Employers' Liability Act (35 Stat. 65; 36 Stat. 291; 36 Stat. 1167; 53 Stat. 1504; 45 U.S.C.A., Sections 51-59), or under Section 6 (8) of the Interstate Commerce Act (39 Stat. 604; 49 U.S.C.A. Section 6 (8)), or under any other Federal statute. No right granted petitioner under the Constitution of the United States is here at issue.

ARGUMENT.

GROUNDS FOR CERTIORARI ARE NOT PRESENT.

Petitioner sought to obtain an injunction in the State Court of Oregon restraining respondent, a resident of Oregon, from prosecuting in the Courts of California an action at law against petitioner to recover damages for the death of her husband under the Federal Employers' Liability Act (45 U.S.C.A. 51 et seq.). Respondent's husband was killed in Oregon as a

result of a collision. The action in California was instituted five months prior to the filing of the petition in Oregon, by an administratrix properly appointed in California. (See *Estate of Waits,* 146 Pac. (2d) 5, 23 A.C. 693.) It was at issue and ready for trial four months prior to the filing of the petition in Oregon. The subsequent proceeding in Oregon was directed against the widow of the decedent who had no right of action under the Federal statute and was not directed against the personal representative of the decedent who had the sole right of action under the Federal statute. Upon the appointment of the personal representative in California she came under the control of the California Court in probate and not under the control of the widow. The California proceeding resulted in a judgment in favor of plaintiff in that action. (See *Leet v. Union Pacific R. Co.,* 144 Pac. (2d) 64, 61 A.C.A. 836, 62 A.C.A. 155.) Any contention of interference with the war effort is now moot.

The petition below alleged as claimed grounds for injunctive relief hardship upon the petitioner (R. 4 et seq.) and interference with the war effort (R. 11 et seq.) in that proper presentation of a defense in California would require petitioner to transport a number of its Oregon employees to California. The petition does not claim that the evidence of petitioner's witnesses could not be presented in deposition form under the laws of the State of California but claims only that "usually such explanations cannot be made

adequately or understandably by witnesses testifying by deposition only." (R. 5.) The doctrine of *res ipsa loquitur* applied to the accident in question and at the trial in California evidence was presented in the form of depositions. (*Leet v. Union Pacific R. Co.*, 144 Pac. (2d) 64.) In the last analysis, the sole claim of petitioner for injunctive relief is a claimed hardship worked upon petitioner and not an interference with interstate commerce or the war effort. The testimony of all of the witnesses petitioner desired to call could have been produced in California by deposition.

This Court held in *Miles, et al. v. Illinois Central R. Co.*, 315 U.S. 698, that a State Court cannot validly exercise its local chancery jurisdiction to enjoin a resident of the State from prosecuting a cause of action arising under the Federal Employers' Liability Act on the ground that the prosecution in the Court of the sister State is inequitable, vexatious and harassing to the carrier.

During Federal control of railroads in the last world war, the Director General of such railroads as were under Federal control ordered that all suits against carriers while under Federal control must be brought in the County or District where the plaintiff resided at the time of the accrual of the cause of action, or in the County or District where the cause of action arose. (See *Alabama & Vicksburg R. Co. v. Journey*, 257 U.S. 111.) At the time of the commencement of the California suit petitioner Union Pacific was not under Federal control.

The Oregon Supreme Court held that the exigencies of the war effort absent any legislative or executive fiat do not require it to enjoin the further prosecution of litigation based upon the Federal Employers' Liability Act and pending in the State Court of California, a State in which it is conceded petitioner does business and operates a portion of its railroad system. (R. 36.) In so holding, the Court did not construe Section 6 (8) of the Interstate Commerce Act or make any determination whatsoever with respect to the duties of the President and the Secretary of War under 10 U.S.C.A., Section 1361. The Oregon Court determined only that no reason appeared why the decision of this Court in *Miles v. Illinois Central R. Co.*, 315 U.S. 698 following *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 should not be followed.

The contentions in the petition were urged by petitioner upon the California Court by motion to abate and motion for continuance, were considered by that Court, and denied. The California Court was the proper Court to dispose of these contentions. In view of the fact that the California case has been tried, all such issues are moot in the Oregon litigation.

No Federal right, substantial or otherwise, was denied to petitioner. No question of substance not theretofore determined by this Court was involved and the decision of the Oregon Court was strictly in accord with applicable decisions of this Court.

It is respectfully submitted that the petition for certiorari is entirely devoid of merit and should be denied.

Dated, San Francisco, California,
July 7, 1944.

GEORGE M. NAUS,
Attorney for Respondent.

CLIFTON HILDEBRAND,
LOUIS H. BROWNSTONE,
Of Counsel.